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IN THE COURT OF APPEALS OF INDIANA

JEREMY EDGAR LITTLE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0610-CR-853
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0207-FA-15

February 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Jeremy Little appeals his sentence for dealing in methamphetamine as a Class A felony, possession of marijuana as a Class D felony, and operating a motor vehicle while privileges are forfeited for life. By agreeing to a specific term of years, Little waived any appellate challenge to his sentence. Therefore, we affirm the judgment of the trial court.

Facts and Procedural History

In February 2002, in Cause No. 79D02-0202-FC-15 ("Cause No. FC-15"), the State charged Little with: Count I, Operating a Vehicle While Privileges are Forfeited for Life, a Class C felony;[1] Count II, Possession of Marijuana as a Class D felony;[2] Count III, Reckless Possession of Paraphernalia as a Class A misdemeanor;[3] Count IV, False Informing as a Class A misdemeanor;[4] and Count V, Maintaining a Common Nuisance as a Class D felony.[5] In July 2002, in Cause No. 79D01-0207-FA-15 ("Cause No. FA-15"), the State charged Little with: Count I, Dealing in Methamphetamine as a Class A felony;[6] Count II, Possession of a Schedule II Controlled Substance;[7] Count III, Dealing

[1] Ind. Code § 9-30-10-17.

[2] Ind. Code § 35-48-4-11.

[3] Ind. Code § 35-48-4-8.3(c) (2002). This section was amended in 2003 to reduce reckless possession of paraphernalia to a Class B misdemeanor. *See* Ind. Code § 35-48-4-8.3 (West 2004).

[4] Ind. Code § 35-44-2-2(c) (2002). Subsection (c) was redesignated as subsection (d) in 2003. *See* Ind. Code § 35-44-2-2 (West 2004).

[5] Ind. Code § 35-48-4-13(b).

[6] Ind. Code § 35-48-4-1(b).

[7] Ind. Code § 35-48-4-7. The charging information indicates that the State charged Little with possession of a Schedule II controlled substance as a Class B felony, *see* Appellant's App. p. 9, but Indiana Code § 35-48-4-7 only mentions Class C and Class D felonies.

in Methamphetamine as a Class A felony;[8] Count IV, Possession of a Schedule II Controlled Substance;[9] Count V, Conspiracy to Commit Dealing in Methamphetamine as a Class A felony;[10] and Count VI, Maintaining a Common Nuisance as a Class D felony.[11]

Pursuant to a plea agreement, Cause No. FC-15 was joined with Cause No. FA-15, and Little pled guilty to Count I, Dealing in Methamphetamine as a Class A felony, Amended Count II, Possession of Marijuana as a Class D felony, and Amended Count III, Operating a Motor Vehicle While Privileges are Forfeited for Life.[12] The eight remaining counts were dismissed. Paragraph 2 of the plea agreement capped the executed portion of Little's sentence at thirty years. Paragraph 5 of the plea agreement provided:

> That, prior to sentencing, [Little] will give a sworn, recorded statement relating fully his knowledge of criminal activity in which he was not involved regardless of the place it occurred and regarding the instant offense and any non-violent offenses that he may have committed in or relating to this county, [Little] will not be prosecuted for any non-violent offense to which he admits in the statement, and the statement may be entered into evidence in the sentencing hearing.

Appellant's App. p. 26. Paragraph 6 of the plea agreement provided:

> That [Little] must pass a polygraph examination given by an examiner selected by the Prosecutor to demonstrate that [Little] has spoken truthfully in all respects in the statement given under paragraph 5; and that, if [Little]

[8] I.C. § 35-48-4-1(b).

[9] I.C. § 35-48-4-7. Again, the charging information indicates that the State charged Little with possession of a Schedule II controlled substance as a Class B felony. *See supra* note 7.

[10] I.C. § 35-48-4-1(b); Ind. Code § 35-41-5-2.

[11] I.C. § 35-48-4-13(b).

[12] Amended Counts II and III were originally Counts II and I, respectively, in Cause No. FC-15.

> does not pass the polygraph as required, then this Court and the Prosecuting Attorney are not bound by any limitations imposed under paragraphs 2 and 5 above, or the Prosecuting Attorney may cancel the agreement and use the statement given by [Little] under paragraph 5 in any manner that the Prosecutor chooses, including prosecuting [Little] based upon that statement, in which event [Little] may withdraw his plea of guilty.

Id. at 27.

Little took and failed the polygraph examination required by paragraph 6 of the plea agreement. The Tippecanoe County Probation Department filed a pre-sentence investigation report, in which it recommended sentences of forty years for Count I, three years for Amended Count II, and eight years for Amended Count III "to run concurrent for a total of forty (40) years with thirty (30) years executed and ten (10) years suspended on Probation with five (5) years Supervised and five (5) years Unsupervised[.]" Document Omitted from Appellant's App. p. 8 (Pre-sentence Investigation Report).

On April 30, 2003, a sentencing hearing was held, and the following exchange occurred between the trial court judge and Little:

> Court: Now the Prosecutor and your defense attorney have indicated to me that in light of the fact there's, you didn't pass the polygraph, uh, what both sides have agreed is that you would agree to the sentencing as recommended by Probation Department.
>
> Little: Yes, sir.

Tr. p. 26-27. The trial court continued: "The aggravators do outweigh the mitigators. Inasmuch as both sides have agreed that this is the disposition in this case, I'm inclined to go along with this agreement and enter sentence accordingly." *Id*. at 28. In a sentencing order issued the same day, the trial court identified a single mitigating circumstance—that Little's imprisonment will result in an undue hardship on his child—and three

aggravating factors—that Little has a history of criminal or delinquent activity, that "the instant offense is non-suspendable," Appellant's App. p. 31, and that Little was on probation at the time of the instant offense. The trial court then noted that the aggravators outweigh the mitigator and sentenced Little according to the probation department's recommendation. This belated appeal ensues.

Discussion and Decision

On appeal, Little argues that the trial court abused its discretion in finding and weighing the aggravating and mitigating circumstances and that his sentence is inappropriate in light of the nature of his offenses and his character. In response, the State contends that Little waived any challenges to the propriety of his sentence by agreeing to be sentenced according to the recommendation of the probation department. We must agree.

The Indiana Supreme Court has noted that when a trial court accepts a plea agreement that calls for a specific term of years, the trial court "has no discretion to impose anything other than the precise sentence upon which they agreed." *Childress v. State*, 848 N.E.2d 1073, 1078 n.4 (Ind. 2006). When the trial court accepts such an agreement and imposes the precise sentence upon which the parties agreed, the defendant can challenge neither the trial court's exercise of discretion (because the trial court has not exercised its discretion) nor the appropriateness of the sentence under Indiana Appellate Rule 7(B). *See Hole v. State*, 851 N.E.2d 302, 304 (Ind. 2006) (holding that by entering plea agreement calling for ten-year sentence, defendant was precluded on appeal

from claiming that trial court failed to find mitigating factors or imposed inappropriate sentence).

Under the original terms of the plea agreement in this case, the trial court retained some sentencing discretion, the only limitation being the thirty-year cap on the executed portion of Little's sentence. *See* Appellant's App. p. 26. However, during the sentencing hearing, Little acknowledged that the terms of the parties' agreement were modified after he failed the polygraph examination. Specifically, Little agreed to serve the sentence recommended by the probation department. *See* Tr. p. 26-27. The trial court imposed the precise sentence upon which the parties agreed. As a result, Little is barred from now challenging the propriety of that sentence. *See Hole*, 851 N.E.2d at 304; *Childress*, 848 N.E.2d at 1078 n.4.

Undeterred, Little contends that the trial court's statement that it was "inclined to go along with this agreement," Tr. p. 28, indicates that the trial court "retained discretion to sentence Little as it saw fit" because the court "could have just as easily been disinclined to go along with the agreement and exercised its discretion by imposing a different sentence." Appellant's Br. p. 6-7. While it is true that the trial court had the discretion to reject the plea agreement if it did not find the specified sentence agreed upon in the plea to be acceptable, once it accepted the agreement, it was bound by the terms of the agreement, which in this case now included a specific term of years with a specific portion of that sentence suspended to probation. *See Badger v. State*, 637 N.E.2d 800, 802 (Ind. 1994) ("[I]f the court accepts the agreement, it becomes bound by the terms of the agreement."). The trial court's comment that it was "inclined to go along

with this agreement" was simply an indication that the court was inclined to accept the plea agreement, which it did.

Affirmed.

BAILEY, J., and BARNES, J., concur.